UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE, Individually and
As Next Friend of JULIE DOE, a minor,

Plaintiffs,

v.

MYSPACE, INC., and
NEWS CORPORATION,

Defendants.

No. 06-cv-7880 (MGC/AJP)

**DEFENDANT MYSPACE, INC.'S REPLY MEMORANDUM**
**IN FURTHER SUPPORT OF ITS MOTION TO TRANSFER**

VINSON & ELKINS, L.L.P.

Clifford Thau (CT 8708)
Ari M. Berman (AB 4928)
Ronald Oran (RO 3317)
666 Fifth Avenue
New York, NY 10103-0040
(212) 237-0000
(212) 237-0010 (Facsimile)

*Attorneys for Defendant MySpace, Inc.*

Michael D. Marin
Susan Denmon Gusky
Christopher V. Popov
The Terrace 7
2801 Via Fortuna, Suite 100
Austin, Texas 78746
(512) 542-8549
(512) 236-3410 (Facsimile)

*Of Counsel*

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Defendant MySpace, Inc. ("***MySpace***") submits this Reply Memorandum of Law in Further Support of Its Motion to Transfer Venue pursuant to 28 U.S.C. § 1404(a), seeking the transfer of this case to the United States District Court for the Western District of Texas, Austin Division. Contemporaneously, MySpace is separately filing its Reply Memorandum of Law in Further Support of Its Motion to Dismiss pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure, seeking dismissal of Plaintiffs' legally insufficient claims.

**PRELIMINARY STATEMENT**

When Plaintiffs initially filed this lawsuit against MySpace in a Texas state court, Plaintiffs acknowledged both that "all or a substantial part of the acts or omissions giving rise to their claims occurred in Travis County, Texas"[1] and that Texas law applies to their claims.[2] Plaintiffs' admissions should guide the Court's inquiry. Nothing has changed, save for the fact that Plaintiffs filed virtually the same basic Complaint in New York and now – incredibly – claim that this case somehow belongs in this Court.

MySpace's moving brief and the accompanying affidavits of Matthew Polesetsky (MySpace's Vice President for Business and Legal Affairs)[3] and Clifford Thau (attorney for MySpace) – detailing the Texas situs of the operative events and potentially relevant witnesses and documents – demonstrate how the applicable public and private interest factors of a 28 U.S.C. § 1404(a) analysis weigh heavily in favor of transfer to the Western District of Texas.

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1 Plaintiffs' Original Petition ("***Orig. Tex. Pet.***") at ¶ 7, filed in *Doe v. MySpace, Inc.*, No. D-1-GN-002209 (261st Dist. Ct., Travis County, Tex. June 19, 2006) (previously attached as Exhibit A to the Affidavit of Clifford Thau, sworn to on October 13, 2006, hereinafter referred to as the "***Thau Affidavit***"); Plaintiffs' First Amended Original Petition ("***Am. Tex. Pet.***") at ¶ 7, filed in *Doe v. MySpace, Inc.*, No. D-1-GN-002209 (261st Dist. Ct., Travis County, Tex. Aug. 6, 2006) (previously attached as Exhibit B to the Thau Affidavit).

2 "All of Plaintiffs' claims asserted in Plaintiffs' First Amended Original Petition are based on Texas common-law." Plaintiffs' First Amended Response to Defendants' Special Objections, filed in *Doe v. MySpace, Inc.*, No. D-1-GN-002209 (261st Dist. Ct., Travis County, Tex. Sep. 1, 2006) (previously attached as Exhibit F to the Thau Affidavit).

3 Affidavit of Matthew Polesetsky, sworn to on October 12, 2006 and hereinafter referred to as the "***Polesetsky Affidavit***."

(*See* Thau Aff. ¶¶ 10-11; Polesetsky Aff. at ¶¶ 4-8.) Unable to refute MySpace's factual or legal arguments, Plaintiffs instead rely on rank speculation and fanciful arguments, simply ignoring many of the pertinent factors under 28 U.S.C. § 1404(a) and well-settled case law applying that statute.

To the extent that Plaintiffs even attempt to address MySpace's arguments, they essentially rely upon three faulty premises. First, Plaintiffs provide unsworn statements by Plaintiffs' counsel that this matter will "soon involve the prosecution of five other nearly identical cases" (Pl.'s Opp. Mem. at p. 5) that Plaintiffs' counsel "intends to file" (*Id.* at p. 1) at some unidentified time in the future on behalf of "five other victims" (*Id.*). Second, Plaintiffs argue that this action belongs in New York because certain unspecified "decisions" allegedly were made in New York by News Corporation ("***News Corp.***"). Third, Plaintiffs claim that their choice of forum is entitled to "great deference." (*Id.* at p. 2.)

Each of Plaintiffs' premises is without merit. First, in ruling upon MySpace's Motion to Transfer, this Court should not consider Plaintiffs' hypothetical assertion that, at some unspecified time, additional, purportedly related lawsuits will be filed with this Court. Presumably, these new lawsuits will be filed here only if the Court denies both the instant Motion and MySpace's Motion to Dismiss. To date though, no such actions have been filed, and Plaintiffs' counsel provides no details from which it can be discerned whether these purported claims may be properly joined.

Second, Plaintiffs' wholly conclusory allegations that unspecified "decisions" were made in New York that led to Plaintiffs' injuries are without merit and unsupported.

Third, as demonstrated in MySpace's moving brief – and as remains unchallenged – Plaintiffs' choice of forum is entitled to little weight because Plaintiffs re-filed their lawsuit outside of their home forum, and the operative facts of this case have no material connection to New York.

## ARGUMENT

MySpace has satisfied its burden of establishing the propriety of transferring this case to the United States District Court for the Western District of Texas pursuant to 28 U.S.C. § 1404. *See, e.g.*, *Schechter v. Tauck Tours, Inc.*, 17 F. Supp. 2d 255, 261 (S.D.N.Y. 1998) ("parties advocating and resisting transfer must provide the court with sufficient information to make an intelligent judgment"). Plaintiffs have failed to rebut any of MySpace's legal and factual support for this Motion and have failed to submit any meaningful argument or evidence in opposition to this Motion. *See id.*

### A. Plaintiffs' Hypothetical Claims are Irrelevant to This Court's 28 U.S.C. § 1404 Analysis

Plaintiffs' opposition rests largely on their counsel's assertion that they will file new, purportedly related, claims with this Court. Plaintiffs, however, have not set forth any details about these hypothetical complaints that could conceivably enable the Court to determine whether the claims are sufficiently related that intervention or consolidation would be appropriate under the Federal Rules of Civil Procedure.[4] Even assuming that these hypothetical claims had been filed and properly joined with Plaintiffs' action, at most, this would be one factor for the Court to consider. As the Second Circuit ruled (in a case Plaintiffs relied upon in their opposition to MySpace's Motion), a District Court may sever distinct claims into separate actions so that they may be transferred pursuant to § 1404(a). *Wyndham Assoc. v. Bintliff*, 398 F.2d 614, 618 (2d Cir. 1968). Unless and until additional cases are filed and consolidated with

[4] Rule 20 of the Federal Rules of Civil Procedure only "allows permissive joinder of [parties] if there is asserted against [or by] them . . . any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." *City of Syracuse v. Onondaga County,* 464 F.3d 297, 307 n. 5 (2d Cir. 2006).

this action, they are not a part of this action and are not relevant to this Court's §1404(a) analysis. *See, e.g., American Home Assur. Co. v. RJR Nabisco Holdings Corp.*, 70 F. Supp. 2d 296, 300 (S.D.N.Y. 1999) (a party that has neither formally intervened nor otherwise been joined in an action lacks standing to seek relief).

B. Plaintiffs Are Forum Shopping

Having previously acknowledged that "all or a substantial part of the acts or omissions giving rise to the [their] claims occurred in Travis County, Texas"[5] and that Texas law should apply to those claims, Plaintiffs now make a sudden 180-degree turn and assert that New York is the location of the operative facts and New York law should apply. Plaintiffs "candidly" explain that, "after associating an additional firm," Plaintiffs' counsel decided to pursue this case and other purportedly related cases in one centralized forum. (Pl.'s Opp. Mem. at p. 2.) Plaintiffs' counsel's desire to prosecute multiple cases in one forum, however, does not favor the Southern District of New York over the Western District of Texas because – if any additional cases are sufficiently related to meet the requirements under the Federal Rules of Civil Procedure – they can be consolidated after this lawsuit is transferred to Texas.

Moreover, Plaintiffs' counsel's *mea culpa* does not explain their abrupt decision to withdraw the Texas action on the eve of a potentially dispositive ruling of dismissal or Plaintiffs' decision to re-file the lawsuit in Bronx County, New York – a venue in which no parties or witnesses reside and that has no nexus to the operative facts of this case (*see* MySpace's Mem. in Supp. at pp. 2 & 5). Plaintiffs' counsel also cannot justify Plaintiffs' retreat from their prior admissions that Plaintiffs' claims are premised on acts or omissions that occurred in the Western District of Texas and that Texas law governs this case.

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[5] Orig. Tex. Pet. at ¶ 7; Am. Tex. Pet. at ¶ 7.

There is, however, a more likely explanation for Plaintiffs' change of heart – forum shopping to avoid what Plaintiffs belatedly concluded was unfavorable Texas law and an apparently unsympathetic jury pool in Austin. Plaintiffs' counsel is undoubtedly aware that Texas' Civil Practice and Remedies Code contains severe loss-allocation rules. Under Texas law, a plaintiff cannot recover *any* damages if its percentage of responsibility is greater than fifty percent. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon 2006). Texas law also provides that a defendant is liable to a claimant *only* for the percentage of the damages "equal to that defendant's percentage of responsibility." TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 (Vernon 2006). Thus, in Texas, Plaintiffs' potential recovery from MySpace is limited to the damages MySpace is determined by a Court to have caused – any damages that non-party Pete Solis, who allegedly sexually assaulted Plaintiff Julie Doe, is found to have caused would not be recoverable. By contrast, under New York law, if a joint tortfeasor is not amenable to personal jurisdiction (as Solis may not be), Defendants may not be able to reduce their proportionate share of any potential liability as a result of Solis's misconduct. N.Y.C.P.L.R. § 1601 (McKinney's 2006).

Furthermore, the Austin community's reaction to Plaintiffs' lawsuit has been unfavorable in that the popular opinion tends to be that MySpace should not bear *any* responsibility for what allegedly happened to Julie Doe. *See, e.g.*, Claire Osborn, *Teen, mom sue MySpace.com for $30 million: Suit filed in Travis County claims popular Internet site fails to protect children from adult sexual predators*, American-Statesmen (June 20, 2006) (appended to this article are twenty-one pages of public comments that are overwhelmingly against MySpace's being liable for any harm that Julie Doe may have suffered).[6] This overwhelming local public opinion presumably

[6] Located at http://www.barryloewy.com/AustinStatesman_MySpace_001.pdf.

was not lost on Plaintiffs' new, or old, counsel when they decided to dismiss their Texas lawsuit in the face Defendants' Special Exceptions – the Texas equivalent of a motion to dismiss – and re-file in the New York Supreme Court for Bronx County.

C. The Public and Private Interest Factors of 28 U.S.C. § 1404(a) Weigh Heavily In Favor of the Western District of Texas

The law is clear that Plaintiffs' choice of forum is entitled to "little weight" because Plaintiffs have filed a lawsuit outside of their home forum and the operative facts have no material connection with New York. *See, e.g., Posven, C.A. v. Liberty Mut. Ins. Co.*, 303 F. Supp. 2d 391, 405 (S.D.N.Y. 2004) (holding that "little weight is accorded" choice of forum when there is not "any significant connection between this action and the Southern District of New York"). MySpace relied on this well-settled proposition in its moving brief and Plaintiffs do not discuss – let alone dispute – this governing law. (MySpace's Mem. in Supp. at p. 18.) Furthermore, Plaintiffs do not dispute in their Opposition that the Western District of Texas is an available alternative forum for this litigation in which venue and jurisdiction are proper. (*See* MySpace's Mem. in Supp. at pp. 8-9.)

*1. The Operative Facts in This Case Occurred in the Western District of Texas*

Plaintiffs have admitted that "all or a substantial part" of the operative facts occurred in the Western District of Texas.[7] To the extent that decisions regarding MySpace's user policies were made, those decisions were largely, if not wholly, made by MySpace in California.[8] Plaintiffs continually equivocate in their Response and Complaint between MySpace and News Corp. – repeatedly referring to "Defendants." Plaintiffs plead no facts showing that News Corp.

[7] Orig. Tex. Pet. at ¶ 7; Am. Tex. Pet. at ¶ 7.

[8] In support of this Motion, MySpace's Vice President for Business and Legal Affairs, Matthew Polesetsky, averred in his – unrefuted – affidavit that MySpace's principal place of business is in California (¶ 4), MySpace's corporate documents and records potentially relevant to this matter are located in California (¶ 7), and the MySpace employees and executives familiar with the facts of this case are likely to be located in California, where the majority of MySpace's employees and executives reside (¶ 8).

made *any* decision relating to this lawsuit, much less that decisions were made in New York that justify maintaining a lawsuit in this Court. Plaintiffs' supposition – unsupported by any facts – that Defendants made decisions in New York that somehow caused injury to Plaintiffs does not make it so and cannot overcome the weight of this lawsuit's overriding nexus with Texas.

2. *In the Western District of Texas All the Relevant Evidence is Subject to Compulsory Process and the Proper Parties to This Lawsuit May All be Joined*

Because the operative facts in this case occurred in the Western District of Texas, it is the only District in which all of the proper parties to this lawsuit may be joined and all the relevant non-party witness and non-party documentary evidence is subject to compulsory process.

First, transfer to the Western District of Texas will ensure that the parties can compel the testimony at trial of crucial non-party witnesses.[9] (*See* MySpace's Mem. in Supp. at pp. 12-13.) Plaintiffs have not identified a single material witness located in New York, while MySpace submitted an affidavit identifying several material witnesses in or near the Austin area (*See* Thau Aff. ¶¶ 10-11) and establishing that the vast majority, if not all, of the potential corporate witness are located in Californa (Polesetsky Aff. at ¶ 8). Plaintiffs do not – and cannot – dispute that the great majority of the potential non-party witnesses – including Solis, the police officers investigating the alleged assault and Julie Doe's counselors, therapists, and doctors – reside in the Western District of Texas. Therefore, it is the Western District of Texas that may compel the appearance of those witnesses at trial pursuant to Rule 45 of the Federal Rules of Civil Procedure.

Additionally, the vast majority of potential party witnesses are located outside of this District in either Texas or California. Plaintiffs Jane and Julie Doe reside in the Western District of Texas. MySpace is headquartered in California, and the vast majority of its employees and executive leadership reside in California. (Polesetsky Aff. at ¶¶ 4,8.) News Corp. is the only Defendant located in this District, but its only connection to this matter is as the parent corporation of MySpace. Accordingly, very few, if any, of News Corp.'s employees located in New York are likely to be material witnesses in this matter.[10] *Beatie and Osborn LLP v. Patriot Scientific Corp.*, 431 F. Supp. 2d 367, 396 (S.D.N.Y. 2006) ("[C]ourts must consider the materiality, nature, and quality of each witness") (internal citation omitted). If any of News Corp.'s employees are ultimately determined to be relevant witnesses, they will be subject to compulsory process because News Corp. is a party.

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[9] The only witnesses that Plaintiffs claim are located in New York are unidentified witnesses from News Corp., who – as a party to the litigation – would be subject to compulsory process in the Western District of Texas. *See* FED. R. CIV. P. 45.

Second, the same considerations apply to potential documentary evidence. Plaintiffs appear dramatically to understate the amount of physical evidence located in the Western District of Texas when they blithely – but without a scintilla of support – suggest that the sources of proof in Austin can likely fit inside "a single redwell [sic]." (Pl.'s Opp. Mem. at p. 4.) The relevant physical evidence held by non-parties located in the Western District of Texas is likely to be greater that a "single redwell [sic]." It is likely to include, but not be limited to: reports and notes by policemen, physicians, and counselors, as well as the computers and phone records of the Plaintiffs and Pete Solis. (Thau Aff. at ¶¶ 10-11.) As with the relevant non-party witnesses, compulsory production of that evidence is available in the Western District of Texas, not New York. *See* FED. R. CIV. P. 45; *Falconwood Fin. Corp. v. Griffin*, 838 F. Supp. 836, 841 (S.D.N.Y. 1993).

Furthermore, most, if not all, of the potentially relevant documents in the Defendants' possession are located in California, where MySpace is headquartered. (*See* Polesetsky Aff. at ¶

[10] News Corp. previously appeared in the Texas lawsuit and is prepared to litigate this case in the Western District of Texas.

4.) To the extent that News Corp. possesses any relevant documents in New York, upon transfer, News Corp. would be subject to the Court's subpoena power pursuant to Rule 45 of the Federal Rules of Civil Procedure. *See U.S. Steel Corp. v. Multistate Tax Comm.*, 417 F. Supp. 795, 804 (S.D.N.Y. 1976) (corporation subject to a state court's *in personam* process may be compelled to produce documents, whether located within or without the court's jurisdiction).

Finally, Plaintiffs also do not – and cannot – dispute that all the proper parties may be joined in the Western District of Texas, but not in New York. Pete Solis, the alleged assailant, is responsible for Plaintiffs' alleged injuries, and therefore, he is a proper party to this action under Rule 20 of the Federal Rules of Civil Procedure because he is an alleged joint tortfeasor whose liability arises "out of the same transaction, occurrence, or series of transactions or occurrences." *City of Syracuse v. Onondaga County* 464 F.3d 297, 307 n. 5 (2d Cir. 2006). Solis, a Texas resident, is subject to personal jurisdiction, and therefore joinder, in the Western District of Texas – but not in New York. In situations such as this, New York courts consistently have recognized that the ability to join an important party is a weighty consideration in favor of transfer. *See, e.g., Ouding v. Nat'l R.R. Passenger Corp.*, No. 93 CIV. 7621, 1994 WL 381437, at *1 (S.D.N.Y. July 19, 1994); *Zangiacomi v. Saunders*, 714 F. Supp. 658, 660 (S.D.N.Y. 1989).

3. *Public Interests Favor Adjudication of This Dispute in the Western District of Texas*

As Plaintiffs conceded in the Texas lawsuit, and under New York's choice-of-law rules, Texas common law will govern this action.[11] Thus, transfer to the Western District of Texas is appropriate because, as this Court has ruled, it makes sense in diversity actions for cases to be adjudicated in the state whose substantive law will govern. *See Ritz Hotel, Ltd. v. Shen Mfg. Co.*, 384 F. Supp. 2d 678, 683 (S.D.N.Y. 2005) (J. Cedarbaum) (a familiarity with the applicable law is a pertinent factor in determining if transfer is appropriate under § 1404(a)).

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[11] "All of Plaintiffs' claims asserted in Plaintiffs' First Amended Original Petition are based on Texas common-law." Plaintiffs' First Amended Response to Defendants' Special Objections, filed in *Doe v. MySpace, Inc.*, No. D-1-GN-002209 (261st Dist. Ct., Travis County, Tex. Sep. 1, 2006) (previously attached as Exhibit F to the Thau Affidavit of Clifford Thau).

New York's choice of law rules mandate application of Texas law. Despite Plaintiffs' claim that the Court can choose to apply New York law because certain so-called "enabling acts" allegedly occurred here, there is no "enabling acts" test under New York choice of law principles. The "locus of the tort" in personal injury and fraud actions is where the last event necessary to make the actor liable – the plaintiff's injuries – occurred. *See Altschuler v. Univ. of Pa. Law School*, No. 95 Civ. 249, 1997 WL 129394, at *11 (S.D.N.Y. Mar. 21, 1997).[12] Plaintiffs do not dispute that their alleged injuries *all* occurred in Texas. (*See generally*, Pl.'s Opp. Mem.; Verified Compl. at p. 20.)

The State of Texas and the Western District of Texas, therefore, have legitimate interests in applying Texas law, protecting the rights of Texas citizens, determining the appropriate liability of Pete Solis, and determining the propriety of MySpace's actions in Texas. *See, e.g., Kolko v. Holiday Inns, Inc.*, 672 F. Supp. 713, 716 (S.D.N.Y. 1987) (localized controversies should be decided at home). New York, on the other hand, has little or no connection to this matter other than the fact that News Corp. is headquartered in New York and MySpace is an Internet company whose services are used in New York – an interest shared by every other state and foreign jurisdiction in which MySpace.com is accessible.[13]

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[12] *See J.A.O. Acquisition Corp. v. Stavitsky*, 745 N.Y.S.2d 634, 639 (N.Y. Sup. 2001) ("[U]nder New York conflict of law principles, fraud claims are governed by the law of the place of injury – in this case New York, where plaintiffs are located.") (citing *Telecom Int'l Amer., Ltd. v. AT & T Corp.*, 67 F. Supp. 2d 189 (S.D.N.Y. 1999); *Palace Explor. Co. v. Petroleum Dev. Co.*, 41 F. Supp. 2d 427, 435 (S.D.N.Y. 1998) (place of reliance on defendant's misrepresentation fixes the situs of the injury).

[13] As demonstrated above, Plaintiffs' assertions that judicial economy would be undermined by a transfer are unfounded. (Pl.'s Opp. Mem. at p. 5.) Consolidation of additional properly joined claims and its attendant benefits can be equally realized in Texas.

## CONCLUSION

In sum, MySpace clearly and convincingly has established that this lawsuit should be transferred to the Western District of Texas, while Plaintiffs have offered nothing but conjecture about un-filed claims purportedly related to this case. Plaintiffs got it exactly right when they chose Texas as the forum for this dispute in the first instance. Their belated, and disingenuous, change of heart cannot overcome the many factors favoring transfer. Therefore, MySpace respectfully submits that its Motion to Transfer this case to the Western District of Texas pursuant to 28 U.S.C. § 1404(a) should be granted.

Dated: November 13, 2006

Respectfully submitted,

VINSON & ELKINS, L.L.P.

By: ______________________

Clifford Thau (CT 8708)
Ari M. Berman (AB 4928)
Ronald Oran (RO 3317)
666 Fifth Avenue
New York, NY 10103-0040
(212) 237-0000
(212) 237-0010 (Facsimile)

*Attorneys for Defendant MySpace, Inc.*

Michael D. Marin
Christopher V. Popov
The Terrace 7
2801 Via Fortuna, Suite 100
Austin, Texas 78746
(512) 542-8549
(512) 236-3410 (Facsimile)

*Of Counsel*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13th day of November, 2006, the Defendant MySpace's Reply Memorandum in Further Support of Its Motion to Transfer was served upon counsel for all parties via the Court's Electronic Notification System.

Clifford Thau